

FILE COPY

No 323

Office - Supreme Court

FILED

JUL 22 1946

CHARLES ELMORE CRO
STATES 91

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

JOE W. BUICE, *Petitioner*

v.

COLONEL HOWARD S. PATTERSON ET AL.,
Respondents

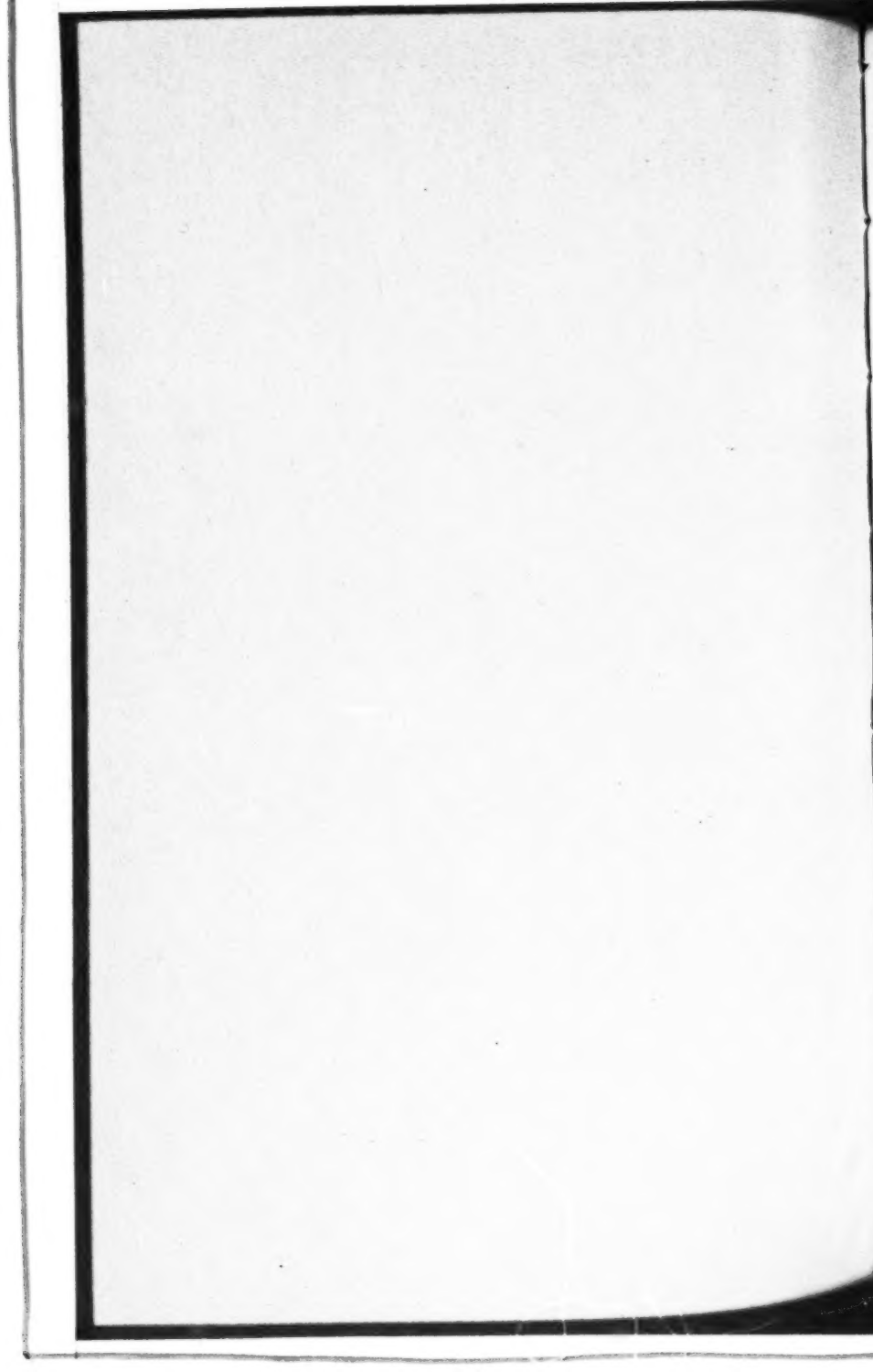
□

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION FOR BAIL
Pending Disposition of Writ of Certiorari
and

ALTERNATIVE MOTION
to Advance Cause for
Argument and Submission

HAYDEN C. COVINGTON
Attorney for Petitioner



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946



JOE W. BUICE, *Petitioner*

v.

**COLONEL HOWARD S. PATTERSON ET AL.,
*Respondents***



**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**MOTION FOR BAIL
Pending Disposition of Writ of Certiorari
and
ALTERNATIVE MOTION
to Advance Cause for
Argument and Submission**

TO THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

Now comes Joe W. Buice, petitioner herein, and moves the court to admit him to bail pending the disposition of the writ of certiorari if, as and when granted.

He made motions to be admitted to bail to the trial court, to the circuit court of appeals, and to the Circuit

Justice. All said motions were denied. Presumably the Circuit Justice denied bail for want of jurisdiction under Rule 45 of the Rules of this court.

This motion is made to the Supreme Court of the United States under paragraph 4 of Rule 45 of the Rules of this court, which provides:

"4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard."

The "special reasons" for the granting of bail by this court are apparent upon the face of the petition for writ of certiorari. Reference is here made to the petition for the writ for such reasons.

The special reasons why this court should admit petitioner to bail under Rule 45 are, among others, plain. It will restore his liberty which was taken away from him by the illegal assumption of jurisdiction by the Army. If the judgment below is reversed and the case remanded for a new trial on which new trial he is discharged under the authority of *Lawrence v. Yost* (CCA-9, decided June 27, 1946), then his detention in custody pending hearing will be unjust. It is fundamental that to avoid injustice bail should be allowed where a substantial question is involved on an appeal. There is no way of restitution of the service of the illegal court-martial sentence. Therefore every reason inheres to give petitioner bail so he can get out from under the jurisdiction of the armed forces. Consequently it will be time enough for petitioner to serve his time in the Army when it is finally decided that the Army has jurisdiction over him. The Army will not lose by his being admitted to bail. He will lose much if he is not allowed bail.

Long before the present rule of this court allowing this court to grant bail for special reasons in habeas corpus cases it has been recognized that a habeas corpus court had authority, indeed the duty in some cases, to relieve a prisoner by releasing him on bond pending a review of an order remanding a prisoner.

"By the common law, upon the return of a writ of habeas corpus and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safekeeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment, but under the authority of the writ of habeas corpus. Pending the hearing he may be bailed *de die in diem*, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court. He may be brought before the court from time to time by its order until it is determined whether he shall be discharged or absolutely remanded." *Barth v. Case*, 12 Wall. 400-403.

Wright v. Henkel, 190 U. S. 40, 51, 63: "We are unwilling to hold that the circuit court possesses no power in respect to admitting to bail other than as specifically vested by statute, or that, where bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief."

In re Murphy (1898) CCD-Mass., 87 F. 549: "If the petitioner applies therefor, we will amend our order, and direct a writ to issue, with the expectation that, on its return, we will order the discharge of the writ, and thereupon consider any application that may be made for admitting to bail pending an appeal, if one is taken."

Re Moss (1904) 23 App. D. C. 474, where, prior to the

promulgation of the present rule, on refusal to discharge petitioner the district court denied bail, the court of appeals allowed bail saying: "If . . . bail be not allowed during the pendency of the appeal, the mere right of appeal, if such right exists for the cause alleged, would be without beneficial effect and valueless to the party. It would seem, therefore, eminently right and proper that the party should be admitted to bail during the pendency of the appeal, under Rule XI of this court, and an order will be signed accordingly."

In extradition cases the bail pending appeal has been allowed, even though the writ was discharged. *Ex parte Reggel* (1885) 114 U. S. 642; *Roberts v. Reilly* (1885) 116 U. S. 80.

Tinkhoff v. Zerbst (CCA-10) 80 F. 2d 464: Prisoner admitted to bail pending appeal of habeas corpus case, to get out and get his appeal fixed up. Order made by the Circuit Court of Appeals.

"Meanwhile the court has ample power to admit the alien to bail or to take his own recognizance [citing cases]." *Whitfield v. Hanges* (CCA-8) 222 F. 745, 756.

A habeas corpus court has jurisdiction to admit to bail in habeas corpus proceedings. *Mosorosky v. Hulbert*, 106 Ore. 274, 198 P. 556, 15 ALR 1076.

State ex rel, Syverson v. Foster, 84 Wash. 58, 146 P. 169, LRA 1915 E, 340.

Petitioner declares that there is no likelihood that he will abscond in event that the relief he requests is granted. He is a citizen of the United States and will continue to reside in the District of Massachusetts, there pursuing his ministerial activities until a final judgment is entered. There is no likelihood that he will violate any law during his qualified detention or enlargement. He has at all times proved to be a man of high character and a Christian gentleman.

WHEREFORE, for the special reasons stated petitioner prays that he be admitted to bail in the reasonable sum of \$2,000 pending disposition of the writ of certiorari or, in the alternative, petitioner prays that the cause be advanced for argument and submission. Petitioner prays for such other and further relief to which he may show himself justly entitled.

JOE W. BUICE, *Petitioner*

By HAYDEN C. COVINGTON

His Attorney of Record